

IN THE  
**Supreme Court of the United States**  
OCTOBER TERM, 1978

**No. 78-1501**

**JAMES JEFFERSON McLAIN, ET AL.,**  
versus *Petitioners,*

**REAL ESTATE BOARD OF NEW ORLEANS, INC., ET AL.,**  
*Respondents.*

**MOTION FOR LEAVE TO FILE A BRIEF  
AMICUS CURIAE AND BRIEF OF AMICUS CURIAE  
CONSUMERS UNION OF UNITED STATES, INC.,  
IN SUPPORT OF PETITIONERS**

**ELLEN BROADMAN**

ALAN MARK SILBERGELD

**Consumers Union**  
1714 Massachusetts Avenue, N.W.  
Washington, D.C. 20036  
Telephone: (202) 785-1906

*Attorneys for Amicus Curiae*

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**MOTION OF CONSUMERS UNION OF UNITED  
STATES, INC., FOR LEAVE TO FILE A BRIEF  
AMICUS CURIAE IN SUPPORT OF PETITIONERS**

Consumers Union of United States, Inc. ("Consumers Union") hereby moves the Court, pursuant to Rule 24, for leave to file the accompanying brief *amicus curiae* in support of the petitioners. Although petitioners consented to the filing of this brief, respondents have refused to give their consent.

**Interest of Amicus Curiae**

Consumers Union is a nonprofit, membership organization chartered in 1936 to provide information, education and counsel about consumer goods and services and the management of family income. Consumers Union publishes *Consumer Reports*, a monthly magazine with a circulation of over 2 million, which regularly carries articles, *inter alia*, on consumer services, marketplace economics and judicial



actions that affect consumer welfare. Over 20,000 residents of Louisiana subscribe to *Consumer Reports*.

Consumers Union has approximately 235,000 members who live throughout the United States, including Louisiana. Many buy and sell homes using the services of a real estate broker.

On January 12, 1979, Consumers Union petitioned the California Real Estate Commission to end industry-wide fixing of real estate brokers' commissions in California. Consumers Union estimates that each year such price fixing costs Californians alone an estimated \$1.5 billion in excess fees, or an average overcharge of \$1,783 on the sale of a home. The petition requested the Real Estate Commissioner to remove barriers to competition among California brokers by preventing brokers and industry associations from fixing fees, by investigating and taking disciplinary action against brokers who engage in anti-competitive acts or practices, and by informing consumers of their rights to negotiate commissions.

#### Facts and Questions Presented By Amicus

*Amicus*, in its brief, presents facts and questions of law that are not otherwise adequately addressed by the parties to this case and that are relevant to the Court's disposition of this case. *Amicus* provides a national perspective; describes evidence of widespread price fixing and discusses the far ranging implications of the Court's decision in this case. If this Court finds that brokers in New Orleans can fix fees with impunity from the Sherman Act, similarly situated local brokers will be able to fix fees throughout the nation with similar impunity. *Amicus* documents that widespread local fee fixing by real estate brokers would substantially effect interstate primary and secondary mortgage markets,

growing interstate real estate franchises and referral networks, and the American economy.

*Amicus* also presents evidence showing that brokers are dependent on interstate financing to earn the commissions they fix through anticompetitive practices. That dependency establishes that price fixing is so inseparable from interstate commerce as to be within the reach of the Sherman Act.

The facts and legal arguments presented by *amicus* should assist this Court to decide if the impact of local price fixing on interstate commerce is substantial, and if fixing of commissions is inseparable from interstate commerce and thus encompassed by the Sherman Act. Since the information and arguments presented by *amicus* will not otherwise be brought to the attention of this Court, *amicus'* request for leave to file a brief *amicus curiae* should be granted.

Respectfully submitted,

ELLEN BROADMAN

ALAN MARK SILBERGELD

1714 Massachusetts Avenue, N.W.  
Washington, D.C. 20036  
(202) 785-1906

*Attorneys for Amicus Curiae*

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**AMICUS CURIAE BRIEF**

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**Interest of Amicus Curiae**

The interest of *amicus curiae* Consumers Union of United States, Inc. in this case is set forth in the accompanying motion for leave to file this brief.

**Issue**

Does price fixing by real estate brokers have a sufficient effect on interstate commerce to be subject to the Sherman Act?



## Argument

### I. Introduction

Throughout the nation, real estate brokers' commissions are set, with remarkable uniformity, at either 6 or 7 percent, regardless of the skill of the broker or the difficulty of selling a particular home.<sup>1</sup> This extraordinary uniformity is rooted in a long history of price fixing by the real estate industry.<sup>2</sup> For many years, local real estate boards published fee schedules which set broker commissions at 6 percent.<sup>3</sup>

<sup>1</sup> Minard, *Why George Babbitt Should Be Smiling In His Grave*, *Forbes*, September 4, 1978, at 44. Three groups have examined independently the California real estate industry and concluded that commission rates are presently fixed at a non-competitive level of 6 percent. B.M. Owen & J. Grundfest, *Licensing of Real Estate Brokers as Underwritten Title Insurance Agency* (Stanford University 1976) (75% of all real estate transactions in California involved a broker's commission of exactly 6%); California Citizen Action Group & California Public Interest Research Group, *Survey of Real Estate Brokerage Commissions* (November 18, 1977) (of brokers surveyed, 97% in Sacramento, 92% in San Francisco and 84% in Los Angeles charged commissions of exactly 6%); Office of the San Diego District Attorney, *Survey of Real Estate Brokerage Commissions* (October 2, 1975) (92.2% of properties listed in San Diego involved a 6% commission).

<sup>2</sup> In a normal competitive market, charges would reflect the ability and experience of the broker, the difficulty of selling a particular house and the cost of doing business for a particular broker.

<sup>3</sup> F. Case, *Real Estate Brokerage* 179 (1965). "Offices normally follow the commission schedules recommended by the local real estate boards. . . . Cutting commissions for any reason is usually discouraged. . . . A firm statement that the commission will be based on a printed schedule will usually discourage buyers and sellers from asking for cuts in the rate"; E. Boyce, *Real Estate Characteristics and Brokerage Operations in Connecticut* 235 (1969) ("Real estate boards in nearly all communities prescribe the rates to be charged by the broker members in various transactions.")

In 1950, those fee schedules were found by the Supreme Court to violate the Sherman Act. *United States v. National Association of Real Estate Boards*, 339 U.S. 485 (1950). Despite this decision, the fixing of commissions at 6 percent persists throughout the real estate industry. Brokers with price fixing arrangements may police colleagues by consulting the multiple listing services ("MLS"). MLS lists information on homes available for sale in a locality, including the commission charged by each broker for each sale.

Anticompetitive forces that maintain commissions at artificially high levels are being examined by the Federal Trade Commission, in a recently launched nationwide investigation. The ability of the FTC and consumers to use the Sherman Act to combat restraints on competition between brokers is at issue in this case.<sup>4</sup> Thus, this Court's decision has implications that extend far beyond New Orleans to real estate sales throughout the United States.

### II. Summary of Argument

A. The unusual uniformity of real estate broker commissions implies widespread price fixing. If brokers in New Orleans can fix their commissions without violating the Sherman Act, so can similarly situated brokers throughout the nation. Widespread local price fixing would so substantially affect interstate financial markets and the American economy that the federal antitrust laws apply to price fixing in each locale.

B. The earning of a brokerage commission is entirely dependent on interstate mortgage funds and, therefore, is in-

<sup>4</sup> The Federal Trade Commission's regulatory authority extends to "unfair methods of competition in or affecting commerce." 15 U.S.C. Section 45(a)(6).

separable from and integral to interstate commerce and encompassed by the Sherman Act.

C. Massive local price fixing would also substantially affect the growing interstate network of real estate franchises and referral services and, therefore, falls within the reach of the Sherman Act.

### III. Scope of The Sherman Act.

The Sherman Act applies to all activities Congress may regulate under the Commerce Clause, *Atlantic Cleaners & Dyers v. United States*, 286 U.S. 427, 432 (1932); *United States v. South-Eastern Underwriters Association*, 322 U.S. 533, 558 (1944), unless Congress specifies otherwise. And Congressional authority under the Clause is broad. Congress may regulate a wholly local activity if it "exerts a substantial economic effect on interstate commerce . . . irrespective of whether such effect is what might at some earlier time have been defined as 'direct' or 'indirect'." *Wickard v. Filburn*, 317 U.S. 111, 125 (1942). Congress can regulate an individual whose effect on interstate commerce is trivial, if "his contribution taken together with that of many others similarly situated, is far from trivial." *Wickard v. Filburn*, *supra* at 127-8.

This Court has found that the commerce clause reaches a wheat farmer who grows a small acreage of wheat for use on his farm, when the actions of this farmer, together with other farmers similarly situated, has a substantial impact on the interstate sale of wheat. *Wickard v. Filburn*, *supra*. Similarly, a small restaurant owner whose racial discrimination has an insignificant impact on interstate commerce falls within the commerce clause when the collective impact on interstate commerce of racial discrimination by restaurants

is significant. *Katzenbach v. McClung*, 379 U.S. 294 (1964); *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241 (1964). And, local milk producers who sell milk only in intrastate markets are subject to federal regulation when their composite impact on interstate milk sales is substantial. *United States v. Wrightwood Dairy Co.*, 315 U.S. 110 (1942). See also *Perez v. United States*, 402 U.S. 146 (1971).

Although each of these cases involved federal laws designed to apply to the specific intrastate activity before the Court, together they define of the boundary of Congressional authority under the Commerce Clause. By doing so, they determine the reach of the Sherman Act, which extends to all acts Congress may regulate under the Commerce Clause. *Atlantic Cleaners & Dyers v. United States*, *supra*; *United States v. South-Eastern Underwriters Association*, *supra*.<sup>5</sup>

### IV. The Sherman Act Applies To Local Brokers Who Have A Substantial Composite Effect on Interstate Commerce.

Judicial sanctioning of fee fixing in New Orleans could permit brokers throughout the nation to fix their fees with impunity from the Sherman Act. Widespread local price fixing would so substantially affect interstate financial markets that the federal antitrust laws apply to price fixing in each locale.

Real estate brokerage is a large industry, which has grown dramatically in dollar volume with the rapid increase in housing prices. Since commissions are a percentage of

<sup>5</sup> The reach of the Sherman Act has "expand[ed] along with expanding notions of congressional power." *Hospital Building Co. v. Trustees of Rex Hospital*, 425 U.S. 738, 744 n.2 (1976).



the sale price of a home, brokerage commissions rise in direct proportion to housing price increases. Nationwide, the price of the average home has nearly tripled in the past ten years, and nearly doubled in the past four years alone.<sup>6</sup> The volume of real estate transactions has soared from \$48 billion in 1968 to \$267.7 billion in 1978.<sup>7</sup> Real estate commissions consequently rose to nearly \$15 billion in 1978.<sup>8</sup>

Commissions naturally increase the sales price of homes, since sellers pay the commissions and pass their costs on to buyers as part of the sale price.<sup>9</sup> The cost to consumers of this increase is multiplied when financed over 20 to 30 years as part of the mortgage on a house. With mortgage interest rates at 10 percent, the added cost attributable to artificially high commissions is tripled when financed over 30 years. Thus, fixed commissions can significantly affect mortgage markets, which operate interstate. See *Goldfarb v. Virginia State Bar*, 421 U.S. 773 (1975).<sup>10</sup>

<sup>6</sup> The average price of an existing home was \$22,300 in 1968, \$35,800 in 1974 and \$55,500 in 1978. National Association of Realtors, Existing Homes Sales 1978 (1979), at 37.

<sup>7</sup> *Ibid.* at 36.

<sup>8</sup> See Minard, *supra* note 1, at 41.

<sup>9</sup> See Owen, Kickbacks, Specialization, Price Fixing, and Efficiency in Residential Real Estate Markets, 29 Stanford L. Rev. 931 (1977).

<sup>10</sup> Petitioners' complaint alleges that respondents help their clients to secure financing, much of which is "obtained from sources outside the State of Louisiana and move[s] in interstate commerce into the State of Louisiana through the activities of the defendants." (Pet. App. 9a).

That effect reverberates through the secondary mortgage market, an interstate market in which outstanding mortgages are sold.<sup>11</sup> Sales in the secondary mortgage market are made primarily to out-of-state federally backed buyers who transfer funds to in-state lenders by purchasing mortgages.<sup>12</sup> Those purchases increase available mortgage funds in the state and transfer funds from areas of credit surplus to areas of credit deficit.<sup>13</sup> Mortgage funds thus are transferred among the states, including Louisiana, through the secondary mortgage market. The Federal National Mortgage Association ("FNMA" or, as popularly known, "Fannie Mae") alone purchased mortgages originated in Louisiana amounting to \$97,947,300 in 1975 and \$107,910,400 between January and September of 1976.<sup>14</sup> Local price fixing through-

<sup>11</sup> Between 1970 and 1975, the secondary mortgage market for loans on 1-4 family homes was approximately one-third the size of the primary market. Department of Housing and Urban Development, The Supply of Mortgage Credit 1970-1974 48 (1975).

<sup>12</sup> The Department of Housing and Urban Development reports that: "the secondary market for home mortgage loans has become heavily Federalized, comprised largely of mortgage buyers backed in one way or another by the U.S. Government." Department of Housing and Urban Development, The Supply of Mortgage Credit 1970-1974 55 (1975). Federal credit agencies and federally sponsored pools purchased \$42 billion, or a market share of 68 percent, of the secondary mortgage market in 1978. Department of Housing and Urban Development, Mortgage Gross Flow, HUD News (March 22, 1979), at 2.

<sup>13</sup> See O. Jones & L. Grebler, The Secondary Mortgage Market, Its Purpose, Performance and Potential 27-52 (1961).

<sup>14</sup> Federal National Mortgage Association: Single Family Mortgages Added to Portfolio - Year to Date, January to June 1976; Hearings on Secondary Market Operations of the Federal National Mortgage Association and the Federal Home Loan Mortgage Corporation Before the Comm. on Banking, Housing & Urban Affairs, 94th Cong., 2d Sess. 453, 456, 459 (1976).

out the nation would have a substantial impact on these primary and secondary mortgage markets and, therefore, is encompassed by the Sherman Act.

V. *Interstate Mortgage Financing is Inseparable From and Integral To The Earning Of a Broker's Commission.*

From the reverse perspective, financing supplied by the secondary and primary mortgage markets enables brokers to earn commissions. Brokers are not entitled to any commission, under law, until financing is procured by the home buyer. Sellers' brokers do not earn a commission until they produce a "ready, willing, and able" buyer, that is, a buyer who has financing to purchase the house.<sup>15</sup> The vast majority of buyers become "able" by obtaining mortgage financing that flows interstate.<sup>16</sup> This interstate financing permits brokers for sellers to earn commissions. Buyers' brokers also depend on that interstate commerce since they, too, are not entitled to a commission until their client obtains financing (and purchases a residence).

Brokers' dependence on interstate funds to earn commissions subjects the fixing of those commissions to the Sherman Act. As held in *United States v. Frankfort Distilleries*, 324 U.S. 293, 297 (1945):

... there is an obvious distinction to be drawn between a course of conduct wholly within a state and conduct which is an inseparable element of a larger program dependent for its success upon activity which affects commerce between the states.

<sup>15</sup> *Morere v. Dixon Real Estate Co.*, 188 So.2d 623 (La. App. 1966), *Ellsworth Dobbs, Inc. v. Johnson*, 50 N.J. 528, 236 A.2d 843 (1967).

<sup>16</sup> Department of Housing and Urban Development, Tenth Annual Report on the National Housing Goal 89 (1979).

This Court long has held that, although the former does not fall within the Sherman Act, the latter does. *Goldfarb v. Virginia State Bar*, *supra* at 785, citing *United States v. Frankfort Distilleries*, *supra*. In *Goldfarb*, title examinations were found to be an integral part of interstate commerce because needed, as a practical matter, to acquire title insurance and mortgage financing. With broker commissions, interstate commerce is needed, as a practical matter, for local brokerage to exist. Thus, brokerage is "an inseparable element of" and "dependent for its success upon" interstate financial markets, *United States v. Frankfort Distilleries*, *supra* and, therefore, encompassed by the Sherman Act.

VI. *Massive Local Price Fixing Would Affect the American Economy.*

If local brokers may fix their commissions, housing prices will rise and that anticompetitive conduct will be felt throughout the national economy. Housing prices are a major component of the consumer price index, which is used widely to determine salary increases and to arrive at a multitude of government economic-related decisions.<sup>17</sup> To the extent that fees are fixed by brokers, this not only increases housing prices, but also affects the consumer price

<sup>17</sup> The cost of home purchases constitutes 10.166 percent of the consumer price index. U.S. Department of Labor, Bureau of Labor Statistics, CPI Detailed Report 7 (April 1979). That index determines salary increases for 5.8 million or 60 percent of the 9.6 million workers who are covered by major collective bargaining agreements. V. Sheifer, Cost of Living Adjustment: Keeping Up With Inflation, Monthly Labor Review (Bureau of Labor Statistics June 1979), at 14. Social Security, food stamp and various other government benefit programs are also indexed to the Consumer Price Index. B. Torrey, E. Morrison & D. Johnson, Automatic Cost of Living Increases in Federal Programs (Office of Management and Budget July 30, 1975).



index, affects salary increases throughout the nation and redirects numerous economic decisions. The breadth of this impact draws such price fixing within the jurisdiction of the Commerce Clause.

VII. *Price Fixing Has a Substantial Impact on the Growing Interstate Network of Real Estate Franchises and Referral Services.*

Allowing price fixing by local brokers also would have an enormous impact on the growing interstate network of real estate franchises and referral services. Interstate networks have expanded rapidly to accommodate a substantial migration between states. Interstate moves to new residences dramatically rose ten-fold in the past 10 years. Between 1965 and 1968, only 1.2 million people moved their residences from one state to another; between 1975 and 1978, well over 13 million moved interstate.<sup>18</sup> The real estate industry has responded by establishing over 30 franchise chains, which have sold 10,000 franchises nationwide and account for over \$800 million in gross commissions.<sup>19</sup> The National Association of Realtors reports that "[f]ew developments have swept so rapidly through the real estate

<sup>18</sup> Department of Commerce, Social and Economic Statistics Administration, Mover Households 1 (1970); Department of Commerce, Bureau of the Census, Geographic Mobility: March 1975 to March 1978 6 (1978).

<sup>19</sup> Minard, *supra* note 1, at 42. The five largest national franchises are Better Homes and Gardens Real Estate Service, Century 21 (with 6,039 firms in 48 states, including Louisiana); Electronic Realty Associates (with 1,650 firms in 36 states); Red Carpet Corporation of America (with 1,200 firms in 16 states); and Gallery of Homes (with 758 firms in 49 states).

industry as the advent of franchising."<sup>20</sup> The number of franchises is growing at a rate of more than 30 percent annually to accommodate the rapid growth in interstate moves.<sup>21</sup>

Relocation firms also have expanded in recent years to assist corporate employees to find housing in locales to which they have been transferred. The Employee Relocation Service estimates that large corporations transferred well over 300,000 employees in 1977.<sup>22</sup> *Forbes* estimates that these transferees are worth over \$1 billion in aggregate commission revenue to the more than 20 relocation firms that operate nationwide.<sup>23</sup> Several of these relocation firms do business in Louisiana: Homes for Living Network of St. Louis, Mo.; RELO of Chicago, Ill.; and Home Equity of America of Darien, Connecticut.<sup>24</sup> If local brokers affiliated with this massive and growing interstate real estate network can set fees at artificially high levels, market distortions will be felt throughout these interstate networks. Such

<sup>20</sup> National Association of Realtors, Real Estate Brokerage 1978: Income, Expenses, Profits 15, 39 (1978). The National Association of Realtors found in its 1976-77 survey of NAR members that 22.1 percent were franchise affiliates. Most of these firms had joined franchises very recently; 23.4 percent joined in the last year; 61 percent had been affiliates for three years or less; and 82 percent joined franchises within the past five years.

<sup>21</sup> *Ibid.* at 15.

<sup>22</sup> Minard, *supra* note 1, at 42.

<sup>23</sup> *Ibid.*

<sup>24</sup> See Original Brief on Behalf of Plaintiff-Appellant in the United States Court of Appeals for the Fifth Circuit, at 13.



impact is sufficiently substantial to subject that price fixing to the Sherman Act. *United States v. International Boxing Club of N.Y.*, 348 U.S. 236 (1955).

### Conclusion

The collective impact of local price fixing on housing prices, on interstate primary and secondary mortgage markets, on the growing interstate network of real estate franchises and on the total economy of the United States, is substantial. Furthermore; this local price fixing depends for its success on interstate mortgage financing that enables brokers to earn commissions. The inseparability of this anticompetitive practice from interstate commerce, and its substantial impact on that commerce, brings price fixing by brokers within the reach of the Sherman Act.

Respectfully submitted,

ELLEN BROADMAN

ALAN MARK SILBERGELD

1714 Massachusetts Avenue, N.W.  
Washington, D.C. 20036  
(202) 785-1906

*Attorneys for Amicus Curiae*